

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

No. 77-6130

**IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT**

B

UNITED STATES POSTAL SERVICE,

Plaintiff

and

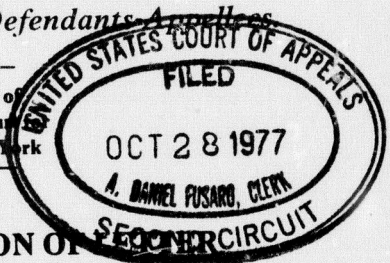
**NATIONAL ASSOCIATION OF LETTER CARRIERS
Plaintiff-Intervenor-Appellant,
v.**

P/S

**PATRICIA H. BRENNAN, J. PAUL BRENNAN
d/b/a P.H. BRENNAN HAND DELIVERY,**

Defendants-Appellees

**On Appeal From An Order of
The United States District Court
The Western District of New York**



**BRIEF FOR
THE NATIONAL ASSOCIATION OF
CARRIERS AS INTERVENOR-APPELLANT**

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**BRIEF FOR
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JURISDICTIONAL STATEMENT

The order appealed from denied a motion to intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure and for permissive intervention under Rule 24(b). Where, as here, there is "no other way [to] better assert the particular interest which warrants intervention" and "practical necessities grant the applicant an absolute

right to intervene," the order denying intervention becomes appealable. *Brotherhood of Railroad Trainmen v. Baltimore and O. R. Co.*, 331 U.S. 519, 524 (1947). Jurisdiction is based on Title 28, Section 1291, United States Code.

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court improperly denied Intervenor-Appellant's intervention in this case.

REFERENCE TO PARTIES AND RULINGS

This case is before the Court upon the appeal of National Association of Letter Carriers, appellant herein, from an order of the United States District Court for the Western District of New York (per Hon. Harold P. Burke, U.S. D.J.) entered on July 12, 1977 (A. 38-39).¹ The Court's order denied appellant's motion for intervention as a plaintiff in an action brought by plaintiff United States Postal Service against defendants-appellees Patricia H. Brennan, J. Paul Brennan d/b/a P. H. Brennan Hand Delivery to enforce those statutes (known collectively as the Private Express Statutes) through which Congress has established and maintains the governmental monopoly over the conveyance of letter mail. The Court's order is not officially reported.

STATEMENT OF THE CASE

As noted above, intervenor-appellant National Association of Letter Carriers (hereinafter the Union) seeks to intervene in an action brought at the behest of the Union by the United States Postal Service (hereinafter the Postal

¹"A." references are to the record on appeal printed in the parties joint appendix.

Service) against defendants-appellees to enforce the collection of statutes through which the Congress has established and maintains the governmental monopoly over the conveyance of letter mail.² Those statutes, including both criminal (See 18 U.S.C. § 1696) and civil (See 39 U.S.C. § 601) components, and referred to collectively as the Private Express Statutes, were originally enacted pursuant to the Constitutional reservation to the Congress of the power "to establish post offices and post roads." Article I, Section 8 of the Constitution of the United States. Taken together, those statutes make it unlawful, and provide for punishment by fine or imprisonment, or both, for any person to "establish [] any private express for the conveyance of letters or packets, or in any manner [to] cause [] or provide [] for the conveyance of the same by regular trips . . . over any post route . . ." (18 U.S.C. § 1696(a)) unless the conditions set forth in 39 U.S.C. § 601 have been satisfied. (18 U.S.C. § 1696(c)). Proceeding by way of civil action only, both the Postal Service complaint and the complaint in intervention proffered by the Union allege that the defendants-appellees are engaged in the collection and delivery of letter mail, as that term has been consistently defined, and are therefore operating in clear violation of the Private Express Statutes' prohibitions against the private carriage for compensation of letter mail (A. 6-10, 28-31).

THE UNDERLYING FACTS

The facts on which the Union's application for leave to intervene is based, and thus the only record facts below, are

²The statutes involved, 18 U.S.C. § 1696 and 39 U.S.C. § 601, do not define the term "letter." That term has, however, been defined in Regulations promulgated by the Postal Service under the authority of 39 U.S.C. § 401(2) as "a message directed to a specific person or address and recorded in or on a tangible object . . ." (39 C.F.R. § 310(a)), and includes "[i]dential messages directed to more than one specific person or address . . ." (39 C.F.R. § 310(a)(6)).

established by the pleadings on file below and the affidavit of Union President J. Joseph Vacca, filed in support of the Union's motion to intervene. Briefly, those facts may be summarized as follows:

The Union is a national labor organization which is the certified exclusive bargaining representative of approximately 200,000 city letter carriers employed by the Postal Service in approximately 6,200 cities throughout the United States (A. 25). Persons employed as city letter carriers in the Postal Service are able to achieve that employment only by successful completion of competitive examinations, after which successful candidates typically begin their employment as part-time employees and move into full-time positions as those positions become available (A. 25-26).

Salaries for full-time Postal Service employees, including city letter carriers, have improved substantially since the effective date of the Postal Reorganization Act of 1970 compared to those in effect before the Act was passed. Postal Service salaries remain relatively low, however (A. 26). Under the collective bargaining agreement currently in effect for example, the maximum salary a regular full-time letter carrier can earn is approximately \$15,000, and a letter carrier must have had 8 years of employment with the Postal Service before he or she is eligible for that maximum salary level (A. 26). Additionally, career Postal Service employees, like other career employees of the federal government, can become eligible to receive retirement annuities after long full-time employment with the Postal Service (A. 26). Such employees may retire with annuities at age 55 if they have 30 years of service, or at age 60 if they have a minimum of 20 years of service. The amount of the annuity for which an employee is eligible increases in proportion to the length of that employee's full-time service in excess of the necessary minimum service (A. 26).

When Congress enacted the Postal Reorganization Act of 1970, it defined, as one of the goals of the Postal Service, the establishment and maintenance of compensation levels for Postal Service employees comparable to those paid in the private sector of the economy, with "particular emphasis on opportunities for career advancements . . . and the achievement of worthwhile and satisfying careers" in the Postal Service. See 39 U.S.C. § 101(c). The achievement of these goals is very important to the city letter carriers represented by the Union (A. 26).

The expectations of city letter carriers as well as other career postal employees that they will be able to make careers in the Postal Service, at adequate and respectable levels of earnings, and that they may rely on the availability of an earned annuity upon their retirement, and the Postal Service's ability to fulfill those expectations, are dependent on the Postal Service's maintenance of its status monopoly on the conveyance of letter mail (A. 27). Any substantial diversion to private express carriers of mail now carried exclusively by the Postal Service would have the direct and immediate effect of depriving city letter carriers of productive work that they now perform, causing them immediate economic harm in the form of lost earnings, as well as long range economic harm in the form of reduction or, in some cases, loss of expected annuities (A. 27).

Approximately 25,000 of the 200,000 city letter carriers represented by the Union are "part-time flexible" employees (A. 27). These persons are career employees whose work schedules require less than full work weeks. They work part-time, at proportionately lower gross levels of compensation, while awaiting the opportunity to convert to full time status (A. 27). One of the most immediate consequences of the diversion of letter mail to private carriers such as defendants-appellees would be the termination of a substantial number of part-time flexible letter carriers from their Postal Service employment (A. 27). The results for the

terminated employees would be disastrous (A. 27). They would lose the source of their income as well as losing the benefit of low cost group health insurance available to postal employees and any expectation that they may have had of achieving full-time, long-term Postal Service careers (A. 27).

PROCEEDINGS IN THE COURT BELOW

On February 24, 1977, the Postal Service, by the United States Attorney for the Western District of New York, filed its civil complaint to enforce the Private Express Statutes against the defendants-appellees (A. 3). The basic factual allegations of the complaint alleged that the defendants-appellees were operating a business involving the private carriage and delivery of letters within the city of Rochester, New York, and that said business is conducted for compensation and takes place over post routes, post roads, and letter carrier routes established for the collection and delivery of mail in Rochester, New York (A. 6-9). On March 22, 1977, the defendants-appellants filed their Answer to the complaint admitting the major factual allegations contained in plaintiff's complaint, but setting forth six separate affirmative defenses challenging the constitutionality of the Private Express Statutes, which create solely issues of law to be decided by the court (A. 13-18).

On or about April 13, 1977, the Union filed its complaint in intervention and motion to intervene as plaintiff in the action brought by the Postal Service (A. 3). The Union's complaint in intervention contained essentially the same factual and legal allegations as the Postal Service complaint, but in addition to the permanent injunctive relief requested by the Postal Service, the Union's complaint also requested preliminary injunctive relief against the defendants-appellants to protect the letter carriers from irreparable harm (A. 28-31).

Thereafter, on May 23, 1977, the court held a hearing on the Union's motion to intervene as plaintiff. Subsequent to the hearing, the Postal Service, by letter of June 14, 1977, from the United States Attorney for the Western District of New York, advised the court below that the Postal Service supported the Union's intervention and urged that the Union should be allowed to intervene (A. 43).

THE DISTRICT COURT'S DECISION

By order of July 12, 1977, Judge Burke rendered his decision. He denied the Union's motion "on the ground that the applicant has no standing to assert its proposed claim, and upon the ground that the applicant has failed to establish that it is entitled to intervene either as a right or with the authorization of the court." (A. 39).

ARGUMENT

Introduction

While the narrow issue before the Court is whether the court below improperly denied the Union's intervention, resolution of this question necessarily entails consideration of at least three separate areas of judicial inquiry which are subsumed within the ultimate issue for the Court's determination. Initially, we submit that this court must find erroneous the ruling of the court below that standing is a necessary predicate to intervention and that the Union has no standing to assert its proposed claim. Secondly, we submit that the court below erred when it ruled that the Union failed to establish that it is otherwise entitled to intervene as of right. Indeed, we will show that the Union clearly established, as required by Rule 24(a), Fed. R. Civ. P., that it timely filed an application claiming a significant interest in the subject of the litigation; and (1) that it is so situated

that the disposition of the action would impair its ability to protect that interest and (2) that its interest is not adequately represented by existing parties. Finally, we propose to demonstrate that, in any event, permissive intervention under Rule 24(b) should have been granted.

I. STANDING IS NOT A BAR TO THE UNION'S INTERVENTION IN THIS CASE.

A. The Notion That Standing Must Be Established As a Requisite For Intervention Is Antithetical To The Concept of Intervention and Inconsistent With The Liberalization of The Federal Rules.

The law of standing is basically a judicial construction, developed principally in the area of administrative law, with statutory overlays of uncertain effect. What is certain, however, is that by its terms, Rule 24(a), Fed. R. Civ. P.,³ does not expressly require standing as a necessary predicate to intervention. Indeed, because the question of standing implicates the Constitutional "case or controversy" requirement,⁴ while Rule 24(a) is intended only to guaran-

RULE 24.

INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

³Art. III, § 2, Constitution of the United States; *Data Processing Service v. Camp*, 397 U.S. 150, 151-152 (1970); *Sierra Club v. Morton*, 405 U.S. 727, 732, n. 3 (1972).

tee that all parties with an interest in otherwise proper litigation are given the opportunity to protect that interest, "[t]he requirements for intervention . . . should generally be more liberal than those for standing to bring suit." *United States v. Board of School Com'rs. of the City of Indianapolis*, 466 F.2d 573, 577 (7th Cir., 1972), cert. denied, 410 U.S. 909. This proposition is strengthened by the 1966 amendments to Rule 24(a) which established the rule in its present form and clearly demonstrate "that the focus of the . . . amendments is on the abandonment of formal, legalistic restrictions and the utilization of pragmatic solutions that guarantee fairness and orderly procedure." Cohen, "The New Federal Rules of Civil Procedure," 54 Geo. L.J. 1204, 1229 (1966). In short, standing has no bearing on the disposition of a request for intervention under Rule 24(a), and the proper test to be applied is a pragmatic one: "[C]onsidering the impact on his interest if he is not given the right to intervene, should the applicant now be granted that right?" 3B Moore's Federal Practice, ¶ 24.09-[1], at 24-285.

The reason standing is not a requirement for intervention can, perhaps, best be explained by analyzing the difference between whether one is a proper plaintiff or defendant in an initial action and the question whether one is entitled to intervene in an ongoing action. In order to determine whether a specific action may be brought by a particular plaintiff against a particular defendant, a court may need to determine whether the controversy is ripe for adjudication, whether the parties before the court are the real parties in interest, and whether the interests asserted are sufficient to warrant use of the judicial process.⁵ In con-

⁵See, Shapiro, "Some Thoughts On Intervention Before Courts, Agencies, and Arbitrators," 81 Harv. L. Rev. 721, 726 (1968). Professor Shapiro provides the following illustration:

"In the federal courts, at least, this distinction in some in-

(continued)

trast, when one seeks to intervene in an ongoing action, these threshold questions have presumably been resolved. Thus, in deciding whether intervention is proper, the court should focus only on whether the prospective intervenor has a sufficient stake in the outcome, considering whether his interest is adequately represented, to justify his inclusion.

A concrete example which demonstrates the validity of this proposition can be gleaned from the case law under Title IV of the Landrum-Griffin Act. Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 482-483 (1964). Under the aforesaid Act, only the Secretary of Labor can initiate an action to set aside a union election. However, it is not true that the complainant who causes the Secretary to initiate the action in the first place may never intervene to protect his interest once the action is filed. The determination regarding intervention, as opposed to initiation, turns on a variety of factors separate from his standing to sue, again focusing on the nature of his interest and the adequacy of the protection afforded that interest by existing parties. Indeed, the Supreme Court has considered these very circumstances and has ruled foursquarely that a union has the right under Rule 24(a)(2) to intervene in such an action. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 537-539 (1972). Thus, while the Court in *Trbovich* did not expressly hold that standing is not a prerequisite for intervention under Rule 24(a)(2), its holding and reasoning are dispositive of the issue present here since the intervenor in *Trbovich* clearly and admittedly

⁵(continued)

stances may be of constitutional dimensions. A may not have a dispute with C that could qualify as a case or controversy, but he may have a sufficient interest in B's dispute with C to warrant his participation in the case once it has begun, and the case or controversy limitation should impose no barrier to his admission." (*Id.*)

lacked standing to initiate the action on his own behalf.⁶ See also, *Hodgson v. UMW*, 473 F.2d 118 (D.C. Cir., 1972).

In the court below, defendants-appellees cited only two cases in support of their erroneous assertion that an applicant for intervention must first establish standing. These cases are most unreliable vehicles in which to undertake what must be an unsuccessful journey to avoid the clear teachings of *Trbovich*. The first, *Solien v. Miscellaneous Drivers and Helpers Local 610*, 440 F.2d 124 (8th Cir., 1971), cert. denied 403 U.S. 905 (1971), involved an application for intervention in a preliminary injunction proceeding brought pursuant to Section 10(1) of the National Labor Relations Act, 29 U.S.C. § 160(1). The court denied intervention because its analysis of Section 10(1) compelled the conclusion that relief under that section was intended by Congress to be available only to the National Labor Relations Board. "The injunctive proceedings [under 10(1)] are ancillary to the main unfair labor practice proceeding [before the Board]" *Solien, supra*, at 128-129. "[A] § 10(1) injunction is effective only during the pendency of the [Board's] administrative proceedings and is not a final adjudication of the parties' rights on the merits." *Id.* The court thus found that § 10(1) was designed only to safeguard the power of the Board, as a practical matter, to grant full relief ultimately, and that therefore only the Board was entitled to seek *that* relief, albeit in the proceedings before the Board itself, where the parties' rights *are* finally adjudicated, all parties are entitled to full party status. See, *UAW Local 238 v. Scofield*, 382 U.S. 205 (1965).

The second case cited by defendants-appellees, *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir., 1967), in fact demonstrates

⁶The Supreme Court commented favorably upon the distinction between initiation and intervention in referring to Professor Shapiro's "thoughtful" article. *Trbovich, supra*, 404 U.S. at 536, n. 7.

that standing is not a prerequisite to intervention. To be sure, the court there first found that the applicant for intervention would have had standing to maintain his claim independently. *Nuesse, supra*, at 700. But the court did not hold such status to be necessary. Indeed, in discussing the scope of the Rule 24(a)(2) "interest" requirement, the court made no mention of the applicant's standing or lack of it:

"... [I]n the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Id.* .

It is clear, therefore, that neither the cases relied on below by defendants-appellees nor any other authority supports the proposition that standing must be established before intervention under Rule 24(a)(2) may be granted.

B. In Any Event, The Union Has Standing To Bring An Action To Enforce The Private Express Statutes.

While this court need not, we submit, examine whether the Union has standing to bring such an action as is involved here, a cursory glance at the record below should nonetheless suffice to indicate that the Union does have standing to bring an action to enforce the Private Express Statutes. One court of Appeals affirming a district court has sustained its standing against challenges. In *NALC v. IPSA*, 470 F.2d 265 (10th Cir., 1972), affirming 336 F.Supp. 804 (W.D. Okla, 1971), the Tenth Circuit held that this Union had standing to bring an action under the Private Express Statutes against a business which was, like defendants-appellees here, engaged in the private carriage of mail. In that case brought and maintained solely by the Union, the court found — in the "economic detriment to

the plaintiff's 200,000 members by the defendant's proposed operation in the form of significant loss of work time, overtime, employment opportunities, future pension and insurance benefits and in morale," — sufficient "personal stake in the controversy" to confer standing upon the Union to maintain it. *NALC v. IPSA*, *supra*, at 270. In finding such standing, the Tenth Circuit applied the standards set forth in *Sierra Club v. Morton*, 405 U.S. 727, 731-732 (1972):

" * * * Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy' *Baker v. Carr*, 369 U.S. 186, 204 * * *, as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' *Flast v. Cohen*, 392 U.S. 83, 101, * * * ."

It cannot rationally be denied that those same indicia of interest, which the Tenth Circuit found to confer standing in *NALC v. IPSA*, are present in the case *sub judice*. As the record amply demonstrates, the economic livelihood and future security of the Union's 200,000 members are directly imperiled by violations of the Private Express Statutes. We simply note here that under the test enunciated in *Sierra Club v. Morton*, *supra*, the Union has plainly established the sufficiency of its stake in this dispute, which is obviously capable of judicial resolution, so as to definitely establish its standing.

Also in *NALC v. IPSA*, *supra*, 470 F.2d 270, the Tenth Circuit noted as an additional matter that, under the doctrine laid down in *Data Processing Services v. Camp*, 397 U.S. 150 (1970), the Union successfully met the "zone of interest" test established by the Supreme Court to consider questions of standing under the Administrative Procedure Act. Applying that test in *Camp*, the Court granted standing to a data processing company in an action against the Comptroller of the Currency and a national bank following the Comptroller's approval of the implementation of certain data processing services by banks as consistent with a federal statute limiting banks to the business of banking. The petitioner's action was brought under the Administrative Procedure Act and alleged injury from the competition (from banks) created by the Comptroller's decision. The Court defined the test for standing under the APA as:

"whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question."

Camp, *supra*, at 153.

The Court then held that it was apparent from the banking statute that petitioner's interests were directly affected by interpretations of the Statute, that the Statute did "arguably bring a competitor within the zone of interests protected by it" and that petitioner therefore had standing. The Tenth Circuit applied this holding in *NALC v. IPSA*, *supra*, at 270, finding NALC and IPSA "in a very real sense to be would-be competitors" and thus found that the Union had standing to maintain its action under the Private Express Statutes. Similarly, in the present case, the Union's members by necessity are competing for the job of carrying the same letter mail that defendants-appellees are carrying and are thus not just arguably but self-evidently within the

zone of interest protected or regulated by the Private Express Statutes.

Defendants-appellees, in the court below, relied on the holding of the Sixth Circuit in *American Postal Workers Union v. IPSA*, 481 F.2d 90 (1973), to defeat the Union's claimed standing. The court in *APWU v. IPSA*, *supra* at 92, found it unnecessary to assess the union plaintiff's claim of economic injury to its members "because we agree with the District Court that [the "zone of interests"] test has relevance only where the action under attack is that of a governmental agency, whereas the present suit is one between private parties." More importantly, the court actually grounded its decision on the fact that the Union plaintiff sought to bring its action under 18 U.S.C. § 1696, "which is clearly a criminal statute, [and] can only be enforced by the proper governmental authorities and that no right of action thereunder resides in the [Union]." *Ibid.* at 93. See also *APWU v. IPSA*, 349 F.Supp. 1297, 1298-1299 (E.D. Mich., 1972). Because the Union in *NALC v. IPSA*, *supra*, brought a civil action to enforce the Private Express Statutes, as did the Postal Service here, the Sixth Circuit's holding in *APWU v. IPSA*, *supra*, that the union plaintiff did not have standing to bring a criminal action is not directly contrary to the Tenth Circuit's earlier holding.⁷ Moreover, the Sixth Circuit in *APWU v. IPSA* failed even to consider the test

⁷As the Tenth Circuit noted, "it is clear to us that the [Union] can maintain a proceeding to protect the employment interests of its members." *NALC v. IPSA*, *supra*, 470 F.2d at 269. Indeed, the Postal Reorganization Act provides that: "Any labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the court of the United States." 39 U.S.C. § 1208(c). Arguably, since the same statute which codifies the civil provisions of the Private Express Statutes (39 U.S.C. § 601) authorizes unions representing postal employees to initiate suits in their behalf, the Postal Reorganization Act provides an implied private right of action to enforce the Private Express Statutes. See *Cort v. Ash*, 422 U.S. 66, 78 (1975).

laid down in *Sierra Club v. Morton, supra*, which the Supreme Court has held to be fundamental whenever the question of a party's standing to sue must be resolved.⁸ Instead, as mentioned, the Sixth Circuit ruled that the "zone of interests" test formulated by *Data Processing Services v. Camp, supra*, was not relevant and therefore did not establish the union plaintiff's standing. We find the Sixth Circuit's reasoning in this regard unpersuasive because the conduct under attack, delivery of letter mail by a private business, was so fundamentally and inherently related to the actions of a governmental agency involving the delivery of letter mail under a monopoly regulated by the Private Express Statutes, as to render it a distinction without a difference — and meaningless in terms of the policy considerations underlying the test — that the action was not brought against the government or that the government was not a party.⁹ In any event, for the above-mentioned reasons, we contend that the Sixth Circuit's ruling in *AP-WU v. IPSA*, does not support the proposition that the Union lacks standing, and that the Tenth Circuit's approach in *NALC v. IPSA* is clearly a more accurate reflection of the law and ought, therefore to be followed here.

⁸As we have shown, *supra* p. 13, the Union here clearly meets that fundamental test, as did the Union in *NALC v. IPSA, supra*.

⁹We note in this regard that in *NALC v. IPSA, supra*, the United States as *amicus curiae* filed a brief in support of the Union urging affirmation of the judgment of the district court. *Ibid.* at 266. We believe that the court should infer from that fact, as well as its failure to intervene, that the Government obviously believes that the Union has standing to bring such an action.

II. THE UNION MEETS ALL THE REQUIREMENTS
FOR INTERVENTION AS OF RIGHT UNDER RULE
24(a)(2).

A. The Union's Intervention Was Timely.

An application for intervention is "timely" within the meaning of Rule 24(a) if made within a reasonable period of time after the applicant has learned of its interest in the case, and if granting the application will not prejudice the interests of the original parties. See *Hodgson v. UMWA*, *supra*, 473 F.2d 118; *EEOC v. United Air Line*, 515 F.2d 946, 949 (7th Cir., 1975). Plaintiff, Postal Service, filed its complaint in this action on February 24, 1977. Defendants-appellees answered on March 25, 1977. The Union's motion to intervene was then filed shortly thereafter, on April 13, 1977. Had the motion been granted, no stage of the litigation would have been delayed. At oral argument on the Union's motion in the court below, counsel for defendants-appellees conceded that the Union's application was timely. It appears, therefore, that there is no issue as to timeliness.

**B. The Union's Interest In the Subject Of
The Litigation Is Undeniable.**

Rule 24(a)(2) requires that the applicant have "an interest relating to the property or transaction which is the subject of the action" In *Donaldson v. United States*, 400 U.S. 517, 531 (1971), the Supreme Court stated that "what is obviously meant there [referring to Rule 24(a)] is a significantly protectible interest." We submit that the Union's interest in the enforcement of the Private Express Statutes is self-evident and well within the confines of judicial decisions concerning the nature of the requisite interest.

Here, as the record amply demonstrates, *supra*, pp. 4-6, the city letter carriers represented by the Union have

a substantial economic interest in the preservation by the Postal Service of the governmental monopoly on the conveyance of letter mail. This significant interest of the letter carriers in their source of livelihood and future security is directly affected by the defendants-appellees' business, for if they were to succeed in this action, thereby successfully breaking the monopoly on the carriage of letter mail enjoyed by the Postal Service, the consequent loss of substantial business to the Postal Service would result in a diminished volume of mail available for delivery by them, thus directly reducing their work and earnings opportunities. Put another way, if defendants-appellees were successful in defending this action, the Postal Service would be deprived of revenue to which it is entitled by law, thereby threatening the financial strength of the Postal Service and decreasing its stability and dependability as an employer of city letter carriers. Indeed, that the Union has a "significantly protectible" interest in such litigation has previously been found by the trial court, and affirmed by the Court of Appeals, in *NALC v. IPSA*, *supra*, 336 F. Supp. at 806, *aff'd*, 470 F.2d at 270.

While the Union's interest in the subject matter of this litigation is, we submit, apparent from the record, judicial precedent establishes the broader proposition that a union has a right to intervene in any proceeding involving the employer of its members where the end result of that proceeding could be the impairment of job opportunities for its members and the economic strength of the union. Thus, in *United States v. Simmond Precision Products, Inc.*, 319 F.Supp. 620 (S.D.N.Y., 1970), a union was held to have the right to intervene in an anti-trust action brought by the government against defendant corporation which involved that corporation's acquisition of a competitor whose employees were represented by the Union. The asserted interest of the union was to protect the job security of employees at the acquired firm. The union sought in-

intervention after a consent decree was reached and submitted to the court for approval. Under the consent decree, the defendant had to divest itself of the acquired firm and had the option of doing so by closing the acquired firm or moving some of its work at that firm to another of its plants. The Union wanted the acquired firm to reassume independent status as a competitor of the defendant and thereby preserve the jobs of its members. In finding that the union's interest satisfied the requirements of Rule 24(a)(2), the court held that under the Supreme Court's liberal interpretation of the relevant language of Rule 24(a) in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the union-intervenor had a clearly sufficient interest in the subject matter of the action to allow it to intervene even though its interest — work preservation for its members — may have been different from the objective of the government in bringing the action. *Simmonds, supra*, at 621.

A Union's interest in protecting the economic interests of its members has also been found sufficient to justify intervention as of right in *General Electric Co. v. Bootz Mfg. Co.*, 289 F.Supp. 504 (S.D. Ind., 1968). That litigation involved GE's action for replevin of materials and tools held by Bootz; the union represented striking employees at Bootz. The thrust of the union's claims was that the replevin action was a collusive suit by which the parties attempted to use the processes of the court to transport goods across picket lines. The court granted the union intervention as of right, finding that the union had a substantial economic interest in continuing to restrict the flow of materials from the plant and that such interest was legally cognizable in terms of Rule 24(a)(2) intervention. *Ibid.*, at 506. Both *Simmonds* and *Bootz* demonstrate that a union's economic interest in the subject matter of litigation is a significantly protectible interest within the meaning of Rule 24(a)(2).

**C. Unfavorable Disposition of The Action
To Enforce The Private Express
Statutes Will Clearly Impair the Union's
Ability To Protect Its Interest.**

An additional requirement upon an applicant for intervention posed by Rule 24(a)(2) is:

". . . that the disposition of the action may as a practical matter impair or impede [movant's] ability to protect that interest . . ."

It may be well to point out that prior to the 1966 amendments to the Federal Rules, an applicant had to show that he might be bound by the decision of the court in the *res judicata* sense in order to successfully move to intervene.¹⁰ The 1966 language changes to the Rule in its present form were "obviously designed to liberalize the right to intervene in federal actions." *Nuesse v. Camp, supra*, 383 F.2d at 694. Indeed, as the D.C. Circuit recognized, Rule 24(a)(2) requires something less than that the judgment "substantially" impair or impede the applicant's protection of his interest, since such restrictive language was proposed by Congress but was deleted in the course of approving the amendment. *Ibid.* Thus, all that need be shown by the Union is that its economic interest in the welfare of its members and their livelihood and future security *may* be affected by the litigation.

As noted above, the Union's interest in this action, as it was in *NALC v. IPSA, supra*, is in protecting the Postal Service monopoly on the delivery of letter mail. Defendant-appellee's interest, of course, is in obtaining judicial approval to operate their business in violation of that monopoly. If they are successful, and if that result survives

¹⁰The actual language of Rule 24(a)(2) provided: ". . . The applicant is or may be bound by a judgment in the action;".

appellate review, the Union's professed interest in this action will as surely and as finally have been lost as it would be if the Union had brought the action itself. A decision in this action favorable to the defendants-appellees will have the effect of *stare decisis* on all future litigation involving this subject matter within this judicial circuit. For this reason, the Fifth Circuit has long recognized *stare decisis* as a "practical disadvantage which warrants intervention of right" as long as the applicant has an otherwise substantial interest and involvement in the subject matter of the action. *Atlantis Development Corp. v. United States*, 370 F.2d 818, 829 (5th Cir., 1967). This case thus presents the clearest conceivable example of a situation where the "possible *stare decisis* effect of an adverse decision," *New York Public Interest Research Group v. Regents of the University of the State of New York*, 516 F.2d 350, 352 (2nd Cir., 1975), constitutes sufficient threat of future impediment to an intervenor's ability to protect his interest to satisfy the Rule 24(a)(2) requirement. For the "*stare decisis*" effect of a ruling on the merits in defendants-appellees' favor here will be the certain extinction of the very interest the Union seeks to protect. The Union's "ability to protect its interest" would not only be "im-pair[ed]" by such a result — it would be lost entirely. This requirement of Rule 24(a)(2) is, therefore, clearly satisfied. *New York Pub. I.R.G., Inc., supra*; *Nuesse v. Camp, supra*, 385 F.2d at 694; *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir., 1969).

**D. The Union's Interest Is Not Adequately
Represented By the Postal Service's At-
torneys.**

An applicant for intervention is entitled to intervene upon making the requisite showing of interest in the action

and potential prejudice to his ability to protect that interest, "unless the applicant's interest is adequately represented by existing parties." Rule 24(a)(2). The prior text of Rule 24 spoke in terms of whether representation by existing parties "is or may be inadequate," and the present language thus "underscores both the burden on those opposing intervention and the need for a liberal application in favor of permitting intervention." *Nuesse v. Camp, supra*, 385 F.2d 702. Moreover, it has been held that the burden of persuasion to demonstrate adequacy of representation falls on the party opposing intervention which is claimed as of right. *New England Petroleum Corp. v. F.E.A.*, 71 FRD 454, 458 (S.D.N.Y., 1976). See also 7A Wright and Miller, *Federal Practice and Procedure* (1972), Civil § 1909 at p. 521. Defendants-appellees have made no such showing here, and the Union should therefore be deemed to be inadequately represented by the Postal Service's attorneys in this action.

In any event, although the Union and the Postal Service share a common purpose in seeking to enjoin defendants-appellees' breach of the governmental monopoly on the carriage of letter mail, that basic similarity of interest should not obliterate the fact that their interests are not co-extensive. Thus, while the Postal Service and its attorneys have an obligation to enforce the laws of the land and prevent unlawful competition to postal delivery services, the Union quite naturally seeks to protect the economic interests of its members in maintaining the governmental monopoly. That this legitimate goal is worthy of protection is elemental, for Congress (p. 5, *supra*) has declared that "opportunities for career advancement . . . and the achievement of worthwhile and satisfying careers" are a "particular[ly]" important objective of the Postal Reorganization Act. 39 U.S.C. § 101(c). In *Nuesse v. Camp, supra*, even though the putative intervenor and the original plaintiff shared the same immediate litigation goal — an

injunction preventing the United States Comptroller of the Currency from approving the opening of a new branch by national bank — the fact that the goal was the product of the parties' differing broad objectives led the court to conclude that the intervenor's interest "may not coincide" with that of the plaintiff, and therefore "may not be adequately represented by any existing party." *Ibid.*, at 703-704. See also, *Dorsey v. Cunningham*, 282 F.2d 842 (D.C. Cir., 1960), where the Court of Appeals granted intervention to hundreds of Teamster local unions, representing over a million members, despite opposition contentions that their interests in administration of a monitorship were adequately represented by the International Union.

Nor does the fact that the "existing party" in question is a governmental agency necessarily satisfy the "adequate representation" requirement. The holding of the Supreme Court in *Trbovich* is dispositive that, for purposes of Rule 24(a)(2), the government may be so interested in protecting the general public interest that it *may not* adequately represent all of the interests of the applicant at whose request it initiated the action. As was the case with the Secretary of Labor in *Trbovich*, the United States Attorney prosecuting this action on behalf of the Postal Service¹¹ likewise serves a dual function: he must represent the interests of the agency itself in order to preserve its statutory monopoly, and he must represent the statutorily established interests of the agency's employees. Both functions are important and proper, yet they may not always dictate precisely the same litigation strategy or immediate objectives. Thus, even if the United States Attorney, like the Secretary of Labor, is per-

¹¹ 39 U.S.C. 409(d) provides: The Department of Justice shall furnish . . . the Postal Service such legal representation as it may require" See *Leonard v. United States Postal Service*, 489 F.2d 814 (1st Cir., 1974).

forming his duties, broadly conceived, as well as can be expected, the employee "union member may have a valid complaint about the performance of 'his lawyer'." *Trbovich*, *supra* at 539. See also *Hodgson v. UMW*, *supra*, 473 F.2d at 130. Facing this same problem in a pending action by a trade association seeking declaratory and injunctive relief against the Postal Service from enforcement of the Private Express Statutes and regulations thereunder prohibiting the private delivery of advertising and merchandising circulars, Judge Barrington Parker of the United States District Court for the District of Columbia recently ruled against the very contention that the Union's interest was adequately represented by the government and granted the Union's intervention under Rule 24(a)(2). *Associated Third Class Mail Users v. United States Postal Service*, No. 76-1768, (D.D.C.), January 5, 1977. (1a).

Here, although the Postal Service has initiated the action at the behest of the Union, it is manifest that their attorneys, in serving their dual function, have not paid maximum attention to the interests of employees and therefore may not adequately represent them. Thus, while contending generally that the Union's interests in the outcome of this action are adequately represented by the government, the defendants-appellees in the court below also asserted that they will be prejudiced if the Union is granted intervention because the Union's complaint requests preliminary injunctive relief, whereas the government has decided not to seek such preliminary relief. This contention alone, however, demonstrates that the Union's "minimal" burden¹² of showing that its "interest [may not be] adequately represented" by the government has been met, for the Union intends to seek preliminary injunctive relief, if warranted, as soon as practicable. Indeed, the

¹²*Trbovich*, *supra*, at 538, n. 10.

Union is legitimately concerned that the diversion of letter mail to defendants-appellees is having a serious effect on the current earnings and employment prospects of a substantial number of part-time flexible letter carriers. Surely, the interests of such employees are entitled to the best possible and most attentive representation which, of course, can best be provided by the Union. That representation, by the government, is plainly inadequate where the representative is unwilling or unable to present all of the evidence and law applicable in the employees' behalf. *Ford Motor Co. v. Bisanz Bros., Inc.*, 249 F.2d 22, 27-28 (8th Cir., 1957).

As this Court has previously stated, *New York Pub. I.R.G. Inc. v. Regents of Univ. of St. of N.Y.*, *supra*, 516 F.2d at 352, where "there is a likelihood that the [applicant representing its own members] will make a more vigorous presentation of the economic side of the argument than would the [existing government party]," the applicant for intervention is not adequately represented by existing parties for purposes of Rule 24(a)(2). In *New York Pub. I.R.G.*, an organization claiming an economic interest in the continuing enforcement of regulations issued and enforced by an agency of the State of New York was held entitled to intervene as of right in a suit against that agency challenging those regulations. There, as here, both the applicant for intervention and the government agency seeking to enforce the laws [regulations] sought the same litigation result. Also, there, as here, the intervenor's interest in the litigation was reflective of the economic interests of its members, while the governmental interest in upholding the validity of its regulations was much broader. In our view, therefore, under the standard reflected in *Trbovich*, *Nuesse v. Camp*, and *New York Pub. I.R.G.*, the Union's demonstrated interest in this action may not be adequately represented by the Postal Service, and its motion to intervene of right was, therefore, erroneously denied.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT PERMISSIVE INTERVENTION UNDER RULE 24(B)

While we contend that the Union has established its right to intervene in this action under Rule 24(a), we maintain alternatively that intervention under Rule 24(b) should in any event have been permitted in the circumstances of this case.

Rule 24(b) provides in pertinent part:

"Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in c

The rule further directs the court, when considering an application for permissive intervention, to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." The discretion committed to the trial court judge in this area is, to be sure, a matter of great delicacy and should generally not be upset lightly. It remains, nevertheless, a judicial discretion subject to review for abuse. *Brotherhood of R. R. Trainmen v. Baltimore and O.R.R. Co.*, 331 U.S. 519, 524-525 (1947); *Nuesse v. Camp, supra*, 385 F.2d at 704.

We submit that Rule 24(b) is, in general, liberally construed in favor of permitting intervention, and that the trial court, in failing to follow the appropriate standards in exercising its discretion, abused its discretion by refusing to permit the Union to intervene. Rule 24(b) "provides basically that anyone may be permitted to intervene if his claim and the main action have a common question of law or fact." *Nuesse, supra*, at 704. Here, as in *Nuesse*, "the legal issues [raised in the complaint and by the Union's complaint in intervention] are the same." *Id.* Furthermore, as we have demonstrated above, the Union has "much more

than a 'general interest' to protect. [Its members] have a real economic stake in the outcome of this litigation." *Textile Workers Union of America v. Allendale Co.*, 226 F.2d 765, 769 (D.C. Cir., 1955). In *Allendale*, the lower court was reversed and the union was permitted to intervene in an action by the employer challenging a determination by the Secretary of Labor under the Walsh Healy Act which raised minimum wages. The union's "common interest" was, of course, to see that the new wage levels were validated. The Court of Appeals found that, since it was preferable to allow the union to intervene and thus allow the issue to be settled in a single action rather than to have a multiplicity of suits, the trial court abused its discretion:

"Under the circumstances of this case, then, we think the denial of appellant's petitions to intervene exceeded the limits of discretion. As we said in *Wolpe v. Poretsky*, [144 F.2d 505 (DC Cir. 1947)] appellants 'have such a vital interest in the result of [the] suit that they should be granted permission to intervene as a matter of course unless compelling reasons against such intervention are shown'. No such 'compelling reasons' are shown. [footnote omitted]." *Ibid.* at 770.

In the case at bar, the defendants-appellees have made no showing that their rights in the litigation will be unduly delayed or prejudiced by the Union's intervention, nor did the district court's order rely on such ground. On the contrary, as in *Allendale*, by permitting the Union to intervene in this action, the court below could have avoided subjecting defendants-appellees and the courts to burdensome multiple litigation. For the Union may well have other actionable causes to bring against defendants-appellees for their unlawful infringement upon the advantageous economic relations and contract rights of employees of the Postal Service. See, *Morris v. Blume*, 55 N.Y.S. 2d 196, 199 (1945), aff'd 56 N.Y.S. 2d 414 (A.D., 1945); *Duane Jones*

Co. v. Burke. 306 N.Y. 172, 117 N.E. 2d 237 (1954). See also, N.Y. Penal Laws § 580(5) (McKinney 1967). Furthermore, the compelling interests of employees in their source of livelihood, and the concomitant interests of the members and their families in both current and future health and pension benefits, as well as the irreparable potential damage to their morale and sense of job satisfaction, all in and of themselves warrant the granting of the Union's intervention in this action. The district court's failure to grant such intervention constitutes a classic case of abuse of discretion, and should, therefore, be reversed.

CONCLUSION

We have demonstrated that the court below erroneously relied on standing as a requirement for intervention and thus erred in failing to grant intervention as of right on that ground. Moreover, we have shown that the Union meets all of the requirements of Rule 24(a)(2) for intervention and, therefore, that denial of the Union's motion to intervene was erroneous. Finally, we have established that, in the alternative, the court below abused its discretion in not granting permissive intervention under Rule 24(b). For these and all the foregoing reasons, we request that this Court reverse the court below and speedily grant the Union's intervention in this action.

Respectfully submitted,

MOZART G. RATNER

PETER J. CARRE

A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

✓ JAN 5 - 1977

ASSOCIATED THIRD CLASS MAIL USERS :
Plaintiff, :
v. : Civil Action No. 76-1768
UNITED STATES POSTAL SERVICE, :
Defendant. :

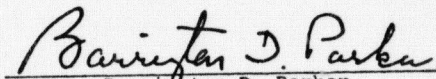
JAMES F. DAVEY, Clerk

O R D E R

It is this 5th day of January, 1977,

ORDERED, that the National Association of Letter Carriers be,
and is hereby, granted leave to intervene as a party defendant
in this action, pursuant to Rule 24(a)(2), Fed. R. Civ. Proc., and
further

ORDERED that the defendant-intervenor shall respond to
plaintiff's Motion For Summary Judgment and Opposition To
Defendant's Motion To Dismiss by January 31, 1977.


Barrington D. Parker
United States District Judge

Copies to Counsel

United States Court of Appeals

for THE SECOND CIRCUIT

UNITED STATES POSTAL SERVICE,

Plaintiff,

and

NATIONAL ASSOCIATION OF LETTER CARRIERS,

Plaintiff-Intervenor-Appellant,

v.

PATRICIA H. BRENNAN, J. PAUL BRENNAN

d/b/a P' H' BRENNAN HAND DELIVERY,

Defendants-Appellees.

No. 77-6130

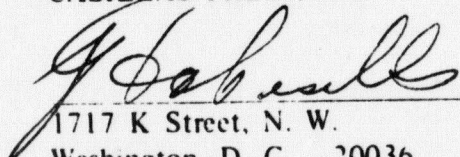
CERTIFICATE OF SERVICE

I hereby certify that I have served by hand (by mail) ^{three} ~~two~~ copies of the BRIEF AND APPENDIX FOR THE NATIONAL ASSOCIATION OF LETTER CARRIERS AS INTERVENOR ^{in the} above-entitled case, on ^{1/2} APPELLANT the following counsel of record, this 21st day of October 1977.

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Subscribed and Sworn to before me this

